

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 CSX TRANSPORTATION, :
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8 :
9 v. :
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12 PORT ERIE PLASTICS, INC., :
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16 :
17 For the Plaintiff:
18 Charles L. Howard, Esquire
19 Hoyle Fickler Herschel & Mathes
20 One South Broad Street
21 Suite 1500
22 Philadelphia, PA 19107-3418
23 For the Defendant:
24 Richard J. Parks, Esquire
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 Erie, PA 16507

Reported by Janis L. Ferguson, RPR
Ferguson & Holdnack Reporting, Inc.

1 THE COURT: What we have for consideration today,
2 the Motion to Dismiss filed on behalf of Port Erie. Why
3 don't you come on up to the podium.

4 MR. PARKS: Good afternoon, Your Honor. Richard
5 Parks on behalf of the Movant, Port Erie Plastics,
6 Incorporated.

7 May it please the Court. This is the time
8 for a hearing on the Motion to Dismiss under Rule 12(b),
9 Your Honor. Basically, in a very, very simple manner --

10 THE COURT: They haven't pled that you're a party
11 to the contract. Is that what your major objection is?

12 MR. PARKS: The major objection is, Your Honor,
13 that they have not pled one of the two factual
14 pre-requisites for liability for demurrage under the Federal
15 Act.

16 THE COURT: What are they, just for the record?

17 MR. PARKS: They are -- you must be factually
18 either the shipper -- in other words, the party who ordered
19 the shipment -- or the consignee; the beneficial recipient
20 of title to whatever was shipped.

21 And, factually, they have gone straight to
22 the end, concluding the demurrage charges are there, without
23 the factual pre-requisite, which is are we a shipper or are
24 we a consignee. And in this particular case, Your Honor,
25 they did --

1 THE COURT: What market? I know we're going
2 outside the four corners of the pleading, but for purposes
3 of sketching the thing in for me, what, as a matter of fact,
4 do you contend that you were or are, and what was the nature
5 of the contractual relationship, if any, here?

6 MR. PARKS: There was no contractual relationship
7 between CSX and Port Erie Plastics.

8 What occurred in this case, as I understand
9 it from my client, Your Honor, was that Port Erie Plastics
10 had a manufacturing agreement to manufacture items for a
11 company by the name of Nexpak, N-E-X-P-A-K. Nexpak would
12 order plastics from a plastics manufacturer, who would have
13 it shipped by the Plaintiff; in this case, CSX. The plastic
14 was shipped by rail car to the Plastek -- not Port Erie
15 Plastics, but Plastek Plastics rail car at the direction of
16 Nexpak.

17 Nexpak would receive the shipment at Plastek,
18 and then they would contract with Presque Isle Trucking to
19 offload the rail car, and then the plastic, which was
20 owned -- was purchased by Nexpak, would be placed at Port
21 Erie Plastics in a silo that was designated for Nexpak's
22 plastic.

23 Port Erie Plastics would then, at the request
24 of Nexpak, take that plastic and manufacture a specific
25 item. And what they were primarily, Your Honor, was the

1 jewel cases for CD's. They would then take that.

2 When the plastic actually came out of the
3 silo and went into the press is the first time that Port
4 Erie Plastics would purchase the raw material from Nexpak.
5 And within the invoices between Nexpak and Port Erie
6 Plastics, there was a set-up charge, a manufacturing charge
7 for the purchase of the plastic. But Port Erie Plastic was
8 not the beneficial owner of the plastic, it was not the
9 party who ordered the offload from CSX, and was not the
10 party who ordered the shipment.

11 And I realize this is all outside the
12 corners. But what happened was they had what -- if you have
13 ever -- if the Court has ever heard of the just-in-time
14 inventory type of item, Nexpak would even -- some of these
15 shipments would be coming out of North Carolina. Nexpak, on
16 the way to the Plastek side, would divert it to its plant in
17 Canton, and some of them were unloaded in Canton.

18 These particular items, Your Honor, they gave
19 us invoices that said we were a shipper. That's one of the
20 reasons in my brief that it's slanted toward the shipper
21 rather than the consignee. But we are neither, factually.

22 The Plaintiff in this case has to tell the
23 Court -- and it's a factual averment -- how you get into a
24 demurrage charge. And they have to aver that we are either
25 factually the shipper or the consignee. I don't think they

1 can do that, and that's why I think the Motion is Dismiss is
2 appropriate in this case.

3 THE COURT: All right. Let me hear from
4 Plaintiff.

5 MR. HOWARD: Please the Court. I'm Charles Howard
6 for CSX.

7 THE COURT: You're going to have to keep your
8 voice up, Mr. Howard. The court reporter -- either the
9 microphone has to get taller or you have to get shorter.

10 MR. HOWARD: I'm Charles Howard from CSX, the
11 Plaintiff.

12 THE COURT: Let me ask a couple questions to just
13 cut right to the chase here. Do you agree with this legal
14 proposition, at least under Third Circuit law, that one of
15 the pre-requisites -- a pre-requisite for liability for
16 demurrage charges is that the entity against whom you are
17 seeking those charges must have been a party to the
18 transportation contract? Do you disagree with that?

19 MR. HOWARD: They certainly have to have been
20 either the shipper or the consignee.

21 THE COURT: All right. Well, let's -- I'm looking
22 at Third Circuit case law, which I'm looking at -- I'm
23 looking at Union Pacific Railroad versus Amitech, 104 F.3d,
24 558, where Judge Rosen indicated that that was the precise
25 issue they were deciding, and they determined that you must

1 be a party to transportation contract, which I suppose is
2 another way of saying you have to be a shipper consignee.
3 Is that right?

4 MR. HOWARD: Yes.

5 THE COURT: Now, is Port Erie, as a matter of
6 fact, a shipper or a consignee, as you understand the facts
7 giving rise to this particular claim?

8 MR. HOWARD: They are a consignee.

9 THE COURT: In what respect?

10 MR. HOWARD: They have the right to receive the
11 shipment. And under CSX's tariff, a consignee is defined as
12 the party to whom a shipment is consigned or the party
13 entitled to receive the shipment.

14 Since we got it -- since Mr. Parks got into
15 some facts, may I get into some facts?

16 THE COURT: Yes. That's why I asked you.

17 MR. HOWARD: It's my understanding that these rail
18 cars, when they arrived at or near the Port Erie plant, that
19 CSX would send what was known as a fax notice to Port Erie.
20 The purpose of that fax notice was to let them know the car
21 was out there and that the demurrage clock had begun to
22 tick.

23 The response that CSX would get would be an
24 order from Port Erie to move the car so that Port Erie could
25 unload the material that was in the car. Once that order

1 was given, the demurrage clock stopped ticking, because
2 before a demurrage charge is exacted against either a
3 shipper or consignee, there's usually a 48-hour or two-day
4 grace period. And Mr. Parks as much as said right here that
5 Port Erie took the materials and used the materials to
6 manufacture jewel cases.

7 I think if you look at the Amitech decision,
8 you'll also see that the Court did focus on the entity that
9 actually took the goods and whether or not they did anything
10 with them. I think that language is right in the Third
11 Circuit's decision as well. That's what occurred here. At
12 least that's my understanding of the facts.

13 THE COURT: Mr. Parks is shaking his head. But I
14 have your point. Is there anything else you want to tell
15 me?

16 MR. HOWARD: Other than I believe that we
17 satisfied the requirements of the federal notice.

18 THE COURT: I don't. But my inclination is I'm
19 probably going to let you amend. And have a seat. You
20 don't have to stand up.

21 Look it, we're just at the beginning of this
22 little dance here, and based upon what Mr. -- is it
23 Mr. Howell? I apologize.

24 MR. HOWARD: Howard.

25 THE COURT: Based upon what Mr. Howard says, he

1 says that in his view, you are, in fact, a consignee. And,
2 clearly, any allegation of you being a shipper or consignee
3 is notoriously absent from the Complaint. I do agree that
4 that is an absolute necessary predicate for liability, which
5 even in the notice pleading situation should be pled. So
6 let me get an Order on the record.

7 Presently pending before the Court is a
8 Motion to Dismiss filed on behalf of the Defendant.
9 Essentially the Defendant claims that the pleading is
10 facially deficient in that it does not allege that the
11 Defendant is either a shipper or consignee under the Act.

12 I note parenthetically that under the
13 controlling Third Circuit law, specifically Union Pacific
14 Railroad versus Amitech, 104 F.3d, 558, Third Circuit, 1997,
15 that liability may only lay against an entity for demurrage
16 charges where that entity is a party to the transportation
17 contract.

18 At oral argument, Mr. Howard advises in his
19 view and based upon his understanding of the facts that Port
20 Erie is, in fact, a consignee.

21 Consequently, I'm going to deny the Motion to
22 Dismiss. I am going to grant the Plaintiff 10 days within
23 which to plead over and cure the previously described
24 deficiency. Plead over and describe the -- specifically the
25 status of Port Erie. And I presume you will plead over and

1 plead that they are a consignee. At that point, Mr. Parks,
2 that's the Order.

3 Now, some of this stuff, it strikes me
4 intuitively, may just have to shake itself out, you know, on
5 a more fully developed record.

6 MR. PARKS: I agree, Your Honor. My only problem,
7 I didn't want to try to have to go down two different paths
8 in denial of the facts --

9 THE COURT: You, actually, now know what you are
10 alleged to be.

11 MR. PARKS: Yes.

12 THE COURT: Whether you believe you are that or
13 not. But that will cure the problem.

14 MR. PARKS: And that will shake out the facts.

15 THE COURT: Let's go off the record here for a
16 second.

17 (Discussion held off the record.)

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19 (Hearing concluded at 1:44 p.m.)

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